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Privileged Statements by Public Officers as Infringements of Discharged Public Employees' Liberty Interests

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PRIVILEGED STATEMENTS BY PUBLIC OFFICERS AS INFRINGEMENTS OF DISCHARGED PUBLIC EMPLOYEES' LIBERTY INTERESTS

Colaizzi v. Walker
542 F.2d 969 (7th Cir. 1976)

As early as 1399,[1] the English courts recognized a rule of privilege in favor of certain public officers, shielding them from suit for statements made in connection with the performance of their official duties.[2] American courts have adopted and expanded this common law privilege or immunity. The privilege is absolute in the cases of legislators,[3] judges and other participants in judicial proceedings,[4] and high ranking executive officers of the federal, state, and local governments.[5] The United States Supreme Court has stated that the public interest in having the effective administration of government uninhibited by the fear of damage suits in respect of official statements generally justifies this absolute privilege.[6]

Lower ranking public officers, on the other hand, are protected by only a qualified privilege.[7] This privilege will not protect a defendant whose remarks were made maliciously. Once the privilege is raised, the defendant will be called as a witness to deny malice on his part. The qualified privilege thus subjects public officers claiming its protection to cross examination upon their official conduct and requires that such conduct be submitted to the judgment of a jury.[8]

While the Supreme Court has been reluctant to permit the erosion of common law privileges and immunities,[9] it has also recognized that fifth or fourteenth amendment liberty interests[10] might be implicated when a public

1. Veeder, *Absolute Immunity in Defamation: Legislative & Executive Proceedings*, 10 COLUM. L. REV. 131, 132 (1910).
2. *See* 50 AM. JUR. 2d *Libel and Slander* §§ 193-94 (1970).
3. *See* U.S. CONST. art. I, § 6, cl. 1.
4. Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463 (1909).
5. Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896).
6. Spalding v. Vilas, 161 U.S. at 498-99.
7. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.21 (1956); *see also* W. PROSSER, LAW OF TORTS 783 (4th ed. 1971) [hereinafter cited as PROSSER].
8. PROSSER, *supra* note 7, at 783-84.
9. *See* notes 61-75 and accompanying text *infra*.
10. "No person shall . . . be deprived of life, liberty or property, without due process of

employee is discharged and official statements relating to the dismissal result in stigma to the individual's reputation or deprivation of new employment opportunities.[11] The Court has not determined who would prevail when such a stigmatizing statement is made by an official whose remarks are absolutely privileged. Clearly, full recognition of the common law immunity of absolute privilege would sometimes result in an erosion of a plaintiff's constitutionally protected liberty interests. The converse, however, is also true. Any diminution of the absolute privilege would be inimical to freedom of expression and the uninhibited operations of government it was created to protect.

Collisions between executive privilege and liberty interests, therefore, pose difficult problems. Perhaps the most troublesome question is whether a court is ever justified in subordinating the public officier's judicially created, but firmly established, privilege to the fired employee's liberty interest. The rapid proliferation of public employee liberty interest actions in recent years[12] and the trend toward expanding the scope of absolute privilege[13] not only portend more frequent clashes between fifth and fourteenth amendment liberty entitlements and the executive officer's privilege, but also mandate an early resolution of this question.

This problem was drawn sharply into focus in *Colaizzi v. Walker*,[14] where the defendant Governor's public announcement of plaintiffs' discharge contained serious charges of official misconduct.[15] The great weight of authority recognizes that statements made by the highest executive officer of a state are absolutely privileged, provided such statements bear some relevance to his official duties.[16] On the other hand, the circumstances out of which this litigation arose seem to fit squarely within the description of a liberty interest infringement as articulated by the Supreme Court.[17]

Thus, the Court of Appeals for the Seventh Circuit was presented in *Colaizzi* with an opportunity to consider whether the constitutionally protected liberty interest must prevail over the common law absolute privilege,

law. . . ." U.S. CONST. amend. V. "No State shall deprive any person of life, liberty or property, without due process of law. . . ." *Id.* amend. XIV.

11. Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

12. *Roth*, decided in 1972, was the first opinion recognizing discharge from public employment, coupled with stigma to the discharged employee's reputation, as an infringement of a constitutionally protected liberty interest. *See* notes 88, 90, 93, and 96 and accompanying text *infra*.

13. *See* Comment, *Defamation Immunity for Executive Officers*, 20 CHI. L. REV. 677, 679-83 (1953).

14. 542 F.2d 969 (7th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3667 (U.S. Apr. 5, 1977) (No. 76-785).

15. 542 F.2d at 971.

16. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.23 (1956).

17. Codd v. Velger, 429 U.S. 624, 625-26 (1977); Bishop v. Wood, 426 U.S. 341, 347-48

despite the policy considerations underlying the latter. With this question in mind, this case comment will focus upon the reasoning of the appellate court in an effort to determine to what extent this decision has aided in the resolution of the problem. Absolute and qualified privileges will be examined, as will the effect of section 1983[18] of the Civil Rights Act upon common law immunities. This article will also trace the development of a body of case law relating to public employee liberty interests. The analysis of the *Colaizzi* opinion will lead to the conclusion that the court failed to take into consideration the policy underpinnings of the Illinois Governor's common law absolute privilege in determining that plaintiffs had stated a claim for deprivation of a protected liberty interest. As a result, the Court of Appeals for the Seventh Circuit has shed little if any light on the issue of whether a public officer's common law privilege might withstand a section 1983 attack for infringement of a constitutionally protected liberty interest.

COLAIZZI V. WALKER

At the time of the incident which prompted this litigation, the named plaintiff, Samuel Colaizzi, was Superintendent of the Division of Private Employment Agencies of the Illinois Department of Labor and a second plaintiff, Samuel Indovina, was an inspector in Colaizzi's division. Neither plaintiff was tenured and no fourteenth amendment property interest in their positions was claimed.[19] Colaizzi and Indovina complained that Illinois Governor Daniel Walker had discharged them from their official positions and simultaneously issued or caused to be issued certain press releases.[20] The initial release announced their dismissal and stated that the Governor's action was taken on the recommendation of Donald Page Moore, the Illinois Director of Special Investigations. This press release went on to assert that Colaizzi and Indovina had abused their official positions in an attempt to force a company under their supervision to drop criminal proceedings against an employee.[21] The complaint stated that the charges in this and other releases were made without notice or an opportunity to be heard and alleged causes of action based on the fourteenth amendment[22] and sections 1981, 1983 and 1985 of the Civil Rights Act.[23] Pendent state claims for defamation were also included.[24]

(1976); Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

18. 42 U.S.C. § 1983 (1970). *See* note 89 *infra*.
19. 542 F.2d at 971-72.
20. *Id.* at 972.
21. *Id.* at 971.
22. *Id.* at 971-72.
23. 42 U.S.C. §§ 1981, 1983, 1985 (1970).
24. 542 F.2d at 971-72.

The trial court granted the motion of defendants Walker, Moore and Staples[25] to dismiss the complaint. The court ruled that as public officials these defendants were protected by absolute privilege from liability for monetary damages under section 1983 resulting from alleged defamatory statements made in the course of their official duties.[26] The court also concluded that the complaint did not state a claim upon which relief could be granted[27] because it failed to allege a sufficient violation of plaintiffs' liberty interests. Thereafter, the district court granted the motion of the remaining defendants for judgment on the pleadings.[28]

The Court of Appeals for the Seventh Circuit agreed that the complaint stated no cause of action based on sections 1981 and 1985 because no racial or otherwise class-based invidiously discriminatory animus was alleged.[29] The appellate court also concurred with the lower court's dismissal of plaintiffs' pendent state claim against Governor Walker and another defendant for defamation, because of the Governor's absolute privilege and the absolute immunity of public officials as to interofficial communications.[30] However, with respect to Donald Page Moore, who was alleged to have repeated the charges in news conferences (thus going beyond interofficial communications), the questions of whether he was entitled to either an absolute or qualified privilege, and, if so entitled, whether his public statements were matters of his official duties were remanded to the district court.[31]

The Seventh Circuit identified as the principal issue the question of whether plaintiffs were deprived of a constitutionally protected liberty interest when Governor Walker issued the press releases without giving them notice or an opportunity to be heard.[32] The court concluded that the facts alleged stated a claim for relief under section 1983.[33]

Before undertaking an analysis of the court's decision on what it perceived to be the principal question, it will be necessary to review the

25. Lauri Staples was an employee in Moore's office.

26. Colaizzi v. Walker, No. 74 C 2130 (N.D. Ill., Dec. 19, 1974) (order granting motion to dismiss complaint).

27. *Id.*

28. Colaizzi v. Walker, No. 74 C 2130 (N.D. Ill., Sept. 15, 1975) (order granting motion for judgment on the pleadings).

29. 542 F.2d at 972.

30. *Id.* at 974.

31. *Id.*

32. *Id.* at 971, 972.

33. *Id.* at 972. With respect to the remaining issues, the court determined that the allegation that the defamation was pursuant to a conspiracy between all defendants stated a claim under section 1983 but added that a qualified, good faith defense might be available. *Id.* at 974. Finally, the court held that the district court could properly entertain the state law claims of defamation against the two employees of the employment agency and against the agency itself. *Id.*

development and current state of the law with regard to the common law immunities of absolute and qualified privilege of executive officers of government, the impact of section 1983 upon common law immunities, and the liberty interests of nontenured public employees.

ABSOLUTE PRIVILEGE

The absolute privilege accorded certain public officers grew out of the struggle between the British Crown and Parliament.[34] The existence of such a privilege had been at its inception considered necessary to prevent the Crown from limiting freedom of speech and matters of deliberation in Parliament.[35] The privilege quickly became a part of the English legal heritage and followed parliamentary government in its progress throughout the world.[36] In this country, freedom of legislative discussion was protected by the Articles of Confederation[37] and the immunity was later embodied in the Constitution.[38]

In addition to being afforded to legislators, absolute immunity also attached to defamatory matter published by any judge or judicial officer, juror, witness, party, or counsel in the course of and with reference to any judicial proceeding.[39] The only qualification imposed is that the statement be somehow relevant to the case.[40] This immunity rests upon public policy grounds and is designed to secure the complete independence of those involved in the administration of justice.[41]

Under the same general policy rationale, the protection of absolute immunity is also extended to certain executive officers of federal, state, and in some jurisdictions, local governments.[42] The leading American cases on the subject of executive officers' privilege are *Spalding v. Vilas*[43] and *Barr v. Matteo*.[44] In *Spalding*, the Supreme Court held that a statement made by the Postmaster General was absolutely privileged, even if made maliciously.[45] Writing for an undivided Court, Mr. Justice Harlan stated that

34. PROSSER, *supra* note 7, at 781.

35. Veeder, *Absolute Immunity in Defamation: Legislative & Executive Proceedings*, 10 COLUM. L. REV. 131, 131-32 (1910).

36. *Id.* at 131.

37. ARTICLES OF CONFEDERATION art. V, para. 5 provided that "[f]reedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress. . . ."

38. U.S. CONST. art. I, § 6, cl. 1 states "for any Speech or Debate in either House, they shall not be questioned in any other Place."

39. PROSSER, *supra* note 7, at 777-79.

40. *Id.* at 778.

41. *Id.*

42. Veeder, *Absolute Immunity in Defamation: Legislative & Executive Proceedings*, 10 COLUM. L. REV. 131, 140-46 (1910).

43. 161 U.S. 483 (1896).

44. 360 U.S. 564 (1959).

45. 161 U.S. at 498-99.

> [t]he head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.[46]

Barr was a libel action against the Acting Director of the Office of Rent Stabilization, an official of lower than cabinet rank. The action was brought by subordinate officials of that office. Plaintiffs contended that defendant's press release, announcing his intention to suspend them because of the part which they had played in formulating a plan for utilization of certain agency funds, had been actuated by malice.[47] Concluding that the principle announced in *Spalding* could not be restricted to executive officers of cabinet rank, the Court held the statement absolutely privileged. The majority reasoned that

> [t]he complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.[48]

In addition to these two United States Supreme Court cases, a number of state courts have recognized the absolute immunity of a governor from liability for defamatory statements made in connection with the performance of his duties.[49] In *Ryan v. Wilson*,[50] the Supreme Court of Iowa held that the Governor of that state was protected by an absolute privilege in a libel action by a former assistant state attorney general. There, the Governor had distributed to members of the press an investigative report containing a statement that the plaintiff had collected a fee from a bank for legal services rendered while he was on the state payroll. This statement was erroneous and the Governor issued a retraction. Although determining that the defendant's communication was absolutely privileged, the court held alternatively that "if we are wrong in our conclusion that the privilege was absolute, it was certainly a qualified privilege."[51] The court thereupon held that the Governor's widely publicized retraction was opposed to any malicious intention and that the plaintiff had not carried his burden of proving actual malice.[52]

46. *Id.* at 498.
47. 360 U.S. at 568.
48. *Id.* at 573.
49. *See* notes 50-58 and accompanying text *infra*.
50. 231 Iowa 33, 300 N.W. 707 (1941).
51. *Id.* at 51, 300 N.W. at 716.
52. *Id.* at 51-52, 300 N.W. at 716.

The Supreme Court of Pennsylvania held in *Sciandra v. Lynett*[53] that the Governor, in publishing a report of an alleged meeting of underworld characters, enjoyed absolute immunity or privilege.[54] The court added that the Governor would be immune from defamation actions even if the statements contained false or inaccurate material and even if published with malice and without reasonable or probable cause.[55]

In *Blair v. Walker*,[56] plaintiffs brought an action for libel against the Governor of Illinois after the defendant had issued two allegedly libelous press releases concerning them. The releases described plaintiffs as unscrupulous men and indicated that the Governor had initiated action to revoke their real estate broker's licenses. The Supreme Court of Illinois held that the defendant was protected from actions for civil defamation by an absolute privilege when issuing statements legitimately related to matters committed to his responsibility and that the Governor was acting within the scope of this privilege when issuing the press releases relating to the plaintiffs.[57] While acknowledging that application of executive immunity might occasionally deny relief to a deserving individual, the court considered the sacrifice justified "by the public's need for free and unfettered action by its representatives."[58]

It can be seen that allowing a public official to assert his privilege as an impenetrable shield against all claims, regardless of merit, will almost certainly close the courthouse doors to some deserving plaintiffs. It is hardly surprising then that the privilege has generally been reserved for high ranking officials only.

QUALIFIED PRIVILEGE

A qualified privilege attaches to good faith communications of lower ranking public officials.[59] In order to invoke this privilege, the defendant must establish that his communication was made on a proper occasion, for a proper purpose, in a proper manner, and to proper parties.[60]

Like the absolute privilege, this privilege is based on public policy grounds. It has been stated that the privilege has its origin in, and is governed by, the rules of good sense and customary conduct.[61] However,

53. 409 Pa. 595, 187 A.2d 586 (1963).
54. *Id.* at 599, 187 A.2d at 588.
55. *Id.*
56. 64 Ill. 2d 1, 349 N.E.2d 385 (1976).
57. *Id.* at 4, 349 N.E.2d at 389.
58. *Id.*
59. *See* Lulay v. Peoria Journal-Star, Inc., 34 Ill. 2d 112, 214 N.E.2d 746 (1966) (privilege attaches to agency).
60. Judge v. Rockford Memorial Hosp., 17 Ill. App. 2d 365, 150 N.E.2d 202 (1958).
61. 50 AM. JUR. 2d *Libel and Slander* § 195 (1970).

unlike the absolute privilege, which precludes any inquiry into the defendant's motives, a defendant attempting to invoke the qualified privilege must submit to a judicial inquiry to determine whether all of the above requirements have been met.[62]

The qualified privilege will be lost if the defendant publishes the defamation in the wrong state of mind.[63] Although it is often said that the privilege is forfeited if the publication is malicious,[64] some commentators consider malice an unsatisfactory term and state that the privilege will be lost whenever the publication is not made primarily for the purpose of furthering the interest which is entitled to protection, or published to accomplish an objective that is outside the scope of the privilege.[65] The privilege is also lost if the defendant acts chiefly from motives of ill will, or if he does not believe what he says.[66]

The qualified privilege does not change the actionable quality of the words published, but merely rebuts the inference of impropriety or malice that is imputed in the absence of privilege. A showing that the privilege was abused is then essential to the right of recovery.[67] Initially, the burden is on the defendant to establish the existence of a privileged occasion for publishing the defamatory matter and this is an issue of law for the court to resolve.[68] Once the defendant establishes the existence of the privilege, the burden is on the plaintiff to prove that it has been abused, that is, that the statement was made maliciously.[69]

Obviously, the public servant claiming a qualified privilege is in a somewhat more precarious position than his superior who might be entitled to an absolute privilege. Once the good faith requirement is met, however, the effect on the defamed plaintiff is the same—he is left without a remedy.

THE EFFECT OF SECTION 1983 UPON COMMON LAW IMMUNITIES

Section 1983, originally enacted as section one of the Civil Rights Act of 1871,[70] provides that every person who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in damages.[71] Thus, section 1983 creates a class of tort liability which on its

62. Comment, *Defamation Immunity for Executive Officers*, 20 CHI. L. REV. 677, 679 (1953).
63. PROSSER, *supra* note 7, at 794.
64. Basarich v. Rodeghero, 24 Ill. App. 3d 889, 321 N.E.2d 739 (1974).
65. PROSSER, *supra* note 7, at 795.
66. *Id.*
67. *Id.* at 792.
68. *Id.* at 796.
69. *Id.*
70. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13.
71. *See* note 89 *infra*.

face does not provide for any immunities. However, the section has not been applied as stringently as it reads.[72] The implications of the literal sweep of section 1983 were first considered in *Tenney v. Brandhove*.[73] There it was claimed that members of a California legislative committee had summoned the plaintiff to appear before them not for a proper legislative purpose, but rather to intimidate him into silence on certain matters of public concern, thereby depriving him of his constitutional rights.[74] Because state legislators had enjoyed absolute immunity for their official actions, *Tenney* squarely presented the question of whether the Reconstruction Congress had intended to restrict the availability in section 1983 cases of those immunities which historically, and for reasons of public policy, had been accorded various categories of officials. The Court concluded that immunities "well grounded in history and reason" had not been abrogated by covert inclusion in the general language of section 1983.[75]

The Supreme Court also has had occasion to consider the section 1983 liability of several types of government officials other than legislators.[76] In *Pierson v. Ray*,[77] the Court found a Mississippi judge immune from liability for damages for his role in the unconstitutional convictions of clergymen who had attempted to integrate a bus terminal waiting room. Observing that the immunity would apply even where the judge was accused of acting maliciously and corruptly, the Court nevertheless determined that this immunity was not abolished by section 1983.[78] In the same opinion, the Court also held that the common law qualified privilege of a policeman to make a good faith arrest upon probable cause was available in an action brought under section 1983.[79]

In *Imbler v. Pachtman*,[80] the petitioner sought damages for loss of liberty allegedly caused by unlawful prosecution, alleging that the respondent, a state prosecuting attorney, had knowingly used false testimony and suppressed material evidence at petitioner's trial. The Court held that a prosecuting attorney who acts within the scope of his duties is absolutely immune from a civil suit for damages under section 1983 because to deny him the privilege would deter him from properly discharging the duties of his office.[81]

72. *See* notes 73-81 and accompanying text *infra*.
73. 341 U.S. 367 (1951).
74. *Id.* at 371.
75. *Id.* at 376.
76. *See* notes 77-84 and accompanying text *infra*.
77. 386 U.S. 547 (1967).
78. *Id.* at 553-54.
79. *Id.* at 555-57.
80. 424 U.S. 409 (1976).
81. *Id.* at 427-28.

A more troublesome question of absolute privilege was presented in *Scheuer v. Rhodes*.[82] There the personal representatives of the estates of students who were killed on the campus of a state controlled university brought damages actions under section 1983 against the Governor of Ohio, the university president, and the Adjutant General, various officers, and enlisted men of the Ohio National Guard. Plaintiffs charged that these defendants, acting under color of state law, had caused an unnecessary national guard deployment on the university campus and ordered the guardsmen to perform allegedly illegal acts, resulting in the students' deaths. Defendants answered that their acts were absolutely privileged. Thus, the Court considered the narrow issue of "whether there is an absolute immunity, as the Court of Appeals determined, governing the specific allegations of the complaint against the chief executive officer of a State, the senior and subordinate officers and enlisted personnel of that State's National Guard, and the president of a state controlled university."[83] The Supreme Court held that the immunity of officers of the executive branch of a state government for their acts is not absolute but qualified and of varying degree, depending upon the scope of discretion and responsibilities of the particular officer and upon the circumstances existing at the time the challenged action was taken.[84]

In *Scheuer*, the Supreme Court seemed to conclude that, in the United States, members of the executive branch had never been absolutely immune from liability for damages resulting from their official acts. Although some federal circuit courts have recognized such absolute immunity,[85] these opinions are not mentioned in *Scheuer*. After concluding that only a qualified privilege existed where official *acts* are complained of, the Court underscored its conclusion by illustrating the dangers which might result from permitting such an absolute privilege to defeat a section 1983 action. Noting that section 1983 was intended to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position, the Court pointed out that section 1983 would be drained of all meaning if it were to hold that the acts of a Governor or other high executive officer have the "quality of a supreme and unchangeable edict, overriding all conflicting rights, and unreviewable through the judicial power of the federal government."[86]

The question of the effect of section 1983 on the common law immunity of an executive officer against defamation actions remains unanswered.

82. 416 U.S. 232 (1974).
83. *Id.* at 242.
84. *Id.* at 247-50.
85. *See, e.g.*, Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).
86. 416 U.S. at 248.

However, *Tenney, Pierson, Imbler,* and *Scheuer* are enlightening as to the reasoning the Court would employ in resolving this issue. The Supreme Court has emphasized that section 1983 was not intended to abolish every common law tort immunity.[87] On the other hand, *Scheuer* demonstrates that where a plaintiff complains of grave harm as a result of an official's acts, a claim of privilege will not be permitted to defeat the complaint without an inquiry as to that official's good faith. These cases illustrate that each common law immunity will be considered separately and that in each case the Court will balance the policy underpinnings of that immunity against the purpose of section 1983. The factors to be considered would be the amount of discretion necessary for the official to properly perform his duties, the likelihood of nuisance lawsuits, the chilling effect of eroding the privilege, the public interest in providing a remedy for every wrong, and the gravity of potential harm for which no redress would be available were a privilege, particularly an absolute privilege, to be recognized.

PUBLIC EMPLOYEES' LIBERTY INTERESTS

The fifth and fourteenth amendments to the United States Constitution prohibit deprivation by the federal or state governments of life, liberty or property without due process of law.[88] Direct actions against state officials for deprivation of constitutional rights are made possible by section 1983.[89]

The courts have not hesitated to find an impermissible infringement of a protected *property* interest when a *tenured* public employee is dismissed without notice and a hearing.[90] However, the plight of the nontenured government employee who is summarily discharged has evoked scant sympathy from the courts, particularly the United States Supreme Court. A long line of Supreme Court decisions supports the general proposition that public employers have virtual carte blanche authority to dismiss nontenured employees without notice, a hearing, or even a statement of the reasons for the discharge.[91] Although a public employee generally cannot assert a property interest in his position in the absence of a contractual or de facto tenure system,[92] recent Supreme Court decisions have described, by way of dicta,

87. *See* note 72 and accompanying text *supra*.
88. U.S. CONST. amends. V and XIV.
89. Section 1983 states:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1970).
90. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 599-602 (1972).
91. *Id.* at 599. *See also* Bishop v. Wood, 426 U.S. 341, 344-46 (1976).
92. 408 U.S. at 599.

situations in which a fired public employee, even though nontenured, might prevail on a theory of infringement of a protected liberty interest.[93]

Supreme Court Decisions

The first such opinion was *Board of Regents v. Roth*,[94] a case involving a nontenured state university teacher who was informed without explanation that he would not be rehired for the ensuing academic year. Although concluding that Roth had been deprived of neither a property nor a liberty interest, the Court stated that "[t]here might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty might be implicated."[95] Noting that the state, in declining to rehire Roth, did not make any charge against him that might seriously damage his standing and associations in his community, the Court stated that if such a charge had been made, due process entitlements would have attached and Roth would have been entitled to a hearing to refute it.[96] This hearing appears to be required by *Wisconsin v. Constantineau*,[97] which dictated that notice and an opportunity to be heard are essential where a person's good name, reputation, honor or integrity is at stake because of "what the government is doing to him."[98] Roth would also have been entitled to a hearing, the Court added, had the state imposed a stigma or disability which could have foreclosed his freedom to take advantage of other employment opportunities.[99]

More recent decisions of the Supreme Court seem to reflect some narrowing of the sweeping dicta of *Constantineau* and *Roth* relating to liberty interests. In *Paul v. Davis*,[100] the Court held that the plaintiff had not been deprived of a liberty or property interest when his photograph and name appeared on a flyer of "active shoplifters" distributed by police to merchants.[101] More specifically, the Court held that reputation alone, apart from some other, more tangible interest such as employment, did not implicate any liberty or property interests sufficient to invoke the procedural protection of the due process clause.[102] Hence, to establish a claim under section 1983 and the fourteenth amendment, more must be involved than simple defamation by a state official.[103]

93. *See* notes 94-111 and accompanying text *infra*.
94. 408 U.S. 564 (1972).
95. *Id.* at 573.
96. *Id.*
97. 400 U.S. 433 (1971).
98. *Id.* at 437.
99. 408 U.S. at 573.
100. 424 U.S. 693 (1976).
101. *Id.* at 694.
102. *Id.* at 712.
103. *Id.* at 702, 712.

In *Bishop v. Wood*,[104] the "more tangible interest such as employment" requirement seemed to have been fulfilled. *Bishop* involved an action brought by a former police officer who contended that his discharge from his job, coupled with charges that he failed to follow orders, seldom attended police training classes, induced low morale among his fellow officers, and engaged in conduct unsuited to an officer amounted to a deprivation of a liberty interest because he had not been afforded a pretermination hearing.[105] The Court determined, however, that the plaintiff had suffered no deprivation of an interest in liberty protected by the due process clause because the reason for his discharge, even if false, was given to him in private and because there was no public disclosure of the reasons.[106] The Court was not troubled by the disclosure made in answers to interrogatories after the litigation commenced because "plaintiff had suffered the injury for which he [sought] redress."[107]

The most recent Supreme Court decision in this area, *Codd v. Velger*,[108] also involved a fired police officer. In *Codd*, the complaint alleged that the plaintiff was entitled to a hearing due to the stigmatizing effect of certain material placed in his file by the New York City Police Department.[109] The Supreme Court held that plaintiff had failed to allege one essential element of his case, namely, that the stigmatizing information contained in the personal file was false.[110] The Court pointed out that the sole purpose of the hearing demanded by plaintiff was to provide him an opportunity to clear his name, and concluded that no hearing could achieve this result unless the plaintiff challenged the substantial truth of the material in question.[111]

Thus, despite the dicta in *Roth* and its progeny to the effect that discharge from public employment plus stigma equals a deprivation of a liberty interest so as to invoke procedural due process safeguards, no plaintiff before the Supreme Court has yet prevailed on this theory. Such plaintiffs have fared better in the lower federal courts but the ambivalence apparent in the brief *Roth* line of Supreme Court decisions has led to various

104. 426 U.S. 341 (1976).
105. *Id.* at 342-44.
106. *Id.* at 348.
107. *Id.* at 348-49. The *Bishop* decision is troubling in at least one respect. It raises the specter of an individual being denied future employment because of the reasons given for termination of his prior employment, even though those reasons might have been false. It seems that when a plaintiff alleges that the reasons given for his dismissal were untrue, he should at least be able to make out a section 1983 claim for injunctive relief to prevent disclosure of the false information to potential employers. *See id.* at 352-53 (Brennan, J., dissenting).
108. 429 U.S. 624 (1977).
109. *Id.* at 625.
110. *Id.* at 626-27.
111. *Id.* at 627.

pronouncements by district and appellate courts. The opinions of these lower courts reflect some disagreement as to the types of statements sufficient to trigger procedural due process safeguards. Some jurisdictions have focused primarily or exclusively upon plaintiff's opportunity to gain new employment,[112] while others have ignored this consideration and have concentrated instead upon the effect of the statement complained of upon the plaintiff's standing and associations in his community.[113]

Circuit Court Decisions

A literal reading of *Roth* suggests that potential harm to both general and professional reputation should be evaluated.[114] This is the approach generally taken by the Second and Fifth Circuits. Decisions by these circuit courts almost invariably contain discussions of the impact of the charges which gave rise to the dismissal upon the plaintiff's reputation in his community and upon his prospects for gaining future employment.[115]

The Sixth Circuit has focused on the stigmatizing effect upon the former employee's good name, holding that in order for charges leveled against a public employee to constitute a deprivation of liberty within the meaning of the fourteenth amendment, those charges must be of such nature as to damage seriously his standing and associations in his community.[116] With respect to future employment, the Sixth Circuit places upon liberty interest plaintiffs the formidable burden of proving a negative, that is, to show "[t]hat a definite range of opportunities is no longer open to them."[117]

112. *See* note 122 and accompanying text *infra*.

113. *See* notes 116-122 and accompanying text *infra*.

114. *See* 408 U.S. at 573-74. This portion of the opinion discusses both general and professional reputation:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case . . . .
>
> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case.

115. *See, e.g.*, Velger v. Cawley, 525 F.2d 334, 336 (2d Cir. 1975), *rev'd on other grounds sub nom.* Codd v. Velger, 429 U.S. 624 (1977); Kaprelian v. Texas Woman's University, 509 F.2d 133, 137 (5th Cir. 1975).

116. *See* Lake Michigan College Fed'n of Teachers v. Lake Michigan Community College, 518 F.2d 1091 (6th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976); Sullivan v. Brown, 544 F.2d 279 (6th Cir. 1976). Because the plaintiff in *Sullivan* had not been discharged, but merely reassigned to another school, the liberty interest claim was considered closed by the Supreme Court's opinion in *Paul v. Davis*, 424 U.S. 693 (1976).

117. *See* Lake Michigan College Fed'n of Teachers v. Lake Michigan Community College, 518 F.2d 1091, 1099 (6th Cir. 1975).

The Ninth Circuit has also directed its inquiry to the impact outside of professional life.[118] Indeed, the Court of Appeals for the Ninth Circuit stated in *Stretten v. Wadsworth Veterans Hospital*[119] that "[l]iberty is not infringed by a label of incompetence, the repercussions of which primarily affect professional life, and which may well force the individual down one or more notches in the professional hierarchy."[120] The court made it clear that it would not consider anything short of a permanent exclusion from, or protracted interruption of, gainful employment within the trade or profession a sufficient taking of liberty so as to invoke procedural due process safeguards. In other words, no constitutional need for procedural protection would be recognized when the likely results of a false charge are reduced economic returns and diminished prestige within the profession.[121]

The Court of Appeals for the Eighth Circuit, on the other hand, has given more attention to the question of whether the defendant's statements adversely affected plaintiff's future employment opportunities.[122] In recent years, the Eighth Circuit has entertained more liberty interest cases than the other circuits. This is not surprising in light of that jurisdiction's emphasis upon a plaintiff's professional reputation. Some damage to a plaintiff's professional reputation might be presumed merely from the fact that he was fired and any statement of the reasons for the dismissal would further decrease his chances of finding a new position. Thus, the liberty interest has been given added context in the Eighth Circuit.

Few liberty interest cases have been decided by the Court of Appeals for the Seventh Circuit and few general statements can be made concerning that court's methodology in such cases. The court has read *Roth* as articulating a two-tiered test which requires determinations of (1) whether plaintiff's good name, reputation, honor or integrity is at stake, and if not, (2) whether the freedom to take advantage of other employment opportunities has been foreclosed.[123] However, the court has not always analyzed these interests separately.[124]

The Seventh Circuit's decisions do indicate that it would require a rather serious allegation of misconduct before a liberty interest claim would be stated. This is particularly apparent in the holding in *Adams v. Wal-*

118. *See* note 119 and accompanying text *infra*.
119. 537 F.2d 361 (9th Cir. 1976).
120. *Id.* at 366.
121. *Id.*
122. *See generally* Horowitz v. Board of Curators, 538 F.2d 1317 (8th Cir. 1976); Greenhill v. Bailey, 519 F.2d 5, 8 (8th Cir. 1975). *Cf.* Brouillette v. Board of Directors, 519 F.2d 126, 127-28 (8th Cir. 1975) (allegations of teacher's inadequacy found to be minor and not determinative).
123. *See* Lipp v. Board of Educ., 470 F.2d 802 (7th Cir. 1972).
124. *See* discussion of Suarez v. Weaver, 484 F.2d 678 (7th Cir. 1973) in Adams v. Walker, 492 F.2d 1003, 1008 (7th Cir. 1974).

ker,[125] a case in which the facts were similar to those in *Colaizzi*. There the Governor removed Adams, the Chairman of the State Liquor Control Board, and advised him of this fact by sending him a telegram indicating that the removal was based upon Adams' "incompetence, neglect of duty, or malfeasance in office."[126] The court held that there had been no taking of liberty without due process of law because the charges were not of such magnitude as to stain plaintiff's reputation or bar his future employment.[127] It was reasoned that the charge of "incompetence, neglect of duty and malfeasance in office" is less stigmatizing because that is the language contained in that portion of the Illinois Constitution which authorizes the Governor to dismiss appointees.[128]

These opinions emphasize the disparate results various jurisdictions might reach in public employee liberty interest actions, even though similar fact patterns might be presented. A plaintiff's chance of success could depend not upon whether he has been harmed but rather upon the seriousness of the harm. Once serious harm is shown, the outcome might still turn on whether the damage is to the plaintiff's general or professional reputation.

ANALYSIS OF THE *COLAIZZI* OPINION

In reversing the decision of the district court, the court of appeals stated as the principal issue the question of "whether defendant Walker's assertions in a press release, that plaintiffs abused their official positions in attempting to force a company under their supervision to drop criminal charges against an employee, deprived plaintiffs of a liberty interest protected by the fourteenth amendment."[129] The question was then resolved in rather mechanical fashion. Since the charges contained in the press release charged sufficiently reprehensible conduct so as to impugn the good names of plaintiffs, and since the stigmatizing statement was accompanied by a discharge from employment, a section 1983 claim for deprivation of liberty without due process had been stated.[130]

It cannot be denied that the deprivation of liberty question was indeed an important one. It seems, however, that an equally important issue was whether the Governor's absolute immunity was available in an action brought under section 1983. This question was not addressed by the court

125. 492 F.2d 1003 (7th Cir. 1974).
126. *Id.* at 1004 (quoting telegram).
127. *Id.* at 1007-08.
128. *Id.* at 1008.
129. 542 F.2d at 971.
130. *Id.* at 972.

and no reason was given for its omission. The defendant's absolute privilege was the primary reason for the lower court's dismissal of plaintiff's complaint as it related to Walker, Moore, and Staples.[131] It was also the first issue argued in plaintiffs' appellate brief.[132] Defendants' brief contained no discussion of the issue, perhaps because they accepted plaintiffs' contention that, in light of *Scheuer v. Rhodes*,[133] Walker was entitled to only a qualified privilege.

This contention should not have been so readily accepted because the issues considered in *Scheuer* were very narrow and because the defendants in *Scheuer* were attempting to invoke an altogether different common law immunity. It might be argued that greater harm could result from allowing high officials to *act* with impunity than from permitting them to assert absolute privilege against damage suits for defamation. The *Colaizzi* and *Scheuer* cases illustrate this point. In *Colaizzi*, the plaintiffs complained of injury to their reputations. In *Scheuer*, Governor Rhodes of Ohio attempted to assert absolute executive privilege as a bar to claims arising out of the deaths of college students killed by Ohio national guardsmen.

One troublesome aspect of the holding in *Colaizzi* is that officials such as former Governor Walker can easily avoid section 1983 liability by simply refusing to comment on the reasons why an employee is fired or to maintain any record of those reasons so as to insure against future disclosures. Without the stigmatizing statement, one element of the plaintiff's cause of action is eliminated. The performance of public employees should, it seems, be subject to public scrutiny.[134] However, secrecy in connection with public employee dismissals seems to be the most predictable, and perhaps the most undesirable, result of *Colaizzi*.

The doctrine of absolute privilege represents a drastic resolution of the conflict between the public interest and the individual's right to be secure in his reputation. Certainly it represents an exception to the maxim that "for every wrong there is a remedy." Perhaps the result in *Colaizzi* can be justified but the Seventh Circuit failed to do so in its opinion. The opinion was not supported by adequate reasoning, and because of this the decision clouds rather than clarifies the question of the effect of section 1983 upon

131. Colaizzi v. Walker, No. 74 C 2130 (N.D. Ill., Dec. 19, 1974). The order granting the motion to dismiss plaintiffs' complaint states: "[T]he court finds that these public officials are protected by the absolute immunity enunciated in Barr v. Matteo, 360 U.S. 564 (1959) from liability for monetary damages under section 1983 for the allegedly defamatory statements made in the course of their official duties . . . ."

132. Brief for Appellant at 1, Colaizzi v. Walker, 542 F.2d 969 (7th Cir. 1976).

133. 416 U.S. 232 (1974).

134. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 264-84 (1964), and Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949) (criticism of public officials entitled to first amendment protection).

the common law privilege. This question should have been addressed and could have been resolved by balancing the countervailing considerations. The purpose of section 1983 and the individual's interest in being free to seek new employment with his reputation untarnished by unwarranted charges should have been weighed against the public interest in shielding responsible governmental officers from the harassment and hazards of vindictive or ill-founded damage suits.

Assuming that the privilege should not be abrogated by section 1983, a plaintiff could not recover unless he alleged that the stigmatizing charges were not within the scope of the official's duties. Plaintiffs harmed by statements falling outside the scope of official duties would be able to maintain a state law action for defamation but could expect to encounter more difficulty in a liberty interest suit brought under section 1983. A liberty interest plaintiff would have to contend on the one hand that the officer's statements were not made within the scope of official duties and on the other that the statements were made under color of state law. These contentions are not necessarily mutually exclusive because a defendant's remarks could fall outside the scope of his official duties but still amount to a deprivation of one's liberty through the official's abuse of his position. This is the very evil that section 1983 was intended to correct.[135]

Unfortunately, each alternative in this balancing process has its inherent evils. If the privilege is recognized, some wrongs might remain unredressed, and if not, a well-meaning public officer might be subjected to retaliatory lawsuits. Former Illinois Governor Walker, for example, has on three occasions been sued because of allegedly defamatory statements made while discharging the duties of his office.[136] Such litigation consumes time and energy which could otherwise be devoted to the administration of government. *Colaizzi* alone has been in the courts for approximately three years.[137]

The reasoning of the Supreme Court in *Spalding v. Vilas*[138] and *Barr v. Matteo*[139] seems no less valid today than when the cases were decided. It appears, therefore, that the absolute immunity of the highest executive officer and those of cabinet or equivalent rank should be recognized in the context of a section 1983 action. With respect to officials of lesser rank, however, the need for an absolute privilege is less apparent. Most subordinate officials have a primary obligation to answer to their superiors, rather

135. *See* Monroe v. Pape, 365 U.S. 167, 172 (1961).

136. In addition to this action, Governor Walker was the defendant in Adams v. Walker, 492 F.2d 1003 (7th Cir. 1974), and Blair v. Walker, 64 Ill. 2d 1, 349 N.E.2d 385 (1976).

137. The complaint in *Colaizzi* was filed on July 29, 1974.

138. 161 U.S. 483 (1896).

139. 360 U.S. 564 (1959).

than to the public at large, and interofficial communications are probably absolutely privileged.[140] Finally, the large number of persons in government who could be classified as "lower ranking executive officers" dictates against a hard and fast rule of absolute immunity for all.

Where lower ranking officers seek to assert an absolute privilege, a similar balancing test should be applied but with some additional considerations placed on the scales. In order to determine whether the defendant's privilege should be absolute or qualified, the court should seek answers to the following questions: (1) Are public announcements of employee dismissals generally made by someone other than this official? (2) If not, is the allegedly stigmatizing statement one which would be defamatory on its face (libel per se or slander actionable without proof of damages)?[141] (3) Does the defendant have significantly greater access to media outlets than the plaintiff? (Would the plaintiff's rebuttal be as widely disseminated as the defendant's statements?) (4) Does the statement substantially diminish plaintiff's ability to gain new employment? If the answer to any of these questions is in the affirmative, or if the scales otherwise tip in plaintiff's favor (for instance, if the facts reveal wider dissemination of the defamatory matter than appears necessary or an apparent lack of basis for the charges), the defendant should be called upon to demonstrate to the satisfaction of a jury that his remarks were made in good faith.[142]

A petition for certiorari was filed in the *Colaizzi* case but review was denied.[143] It seems clear that the decision to abandon the absolute privilege argument at the appellate court level was an improvident one. Walker has now been found amenable to suit for infringement of plaintiff's liberty interests, but the question of his absolute immunity from such suits has not even been considered. It is now too late for former Governor Walker to assert the privilege as the basis for a rule 12(b)(6) motion to dismiss[144] but he still might affirmatively plead the privilege in his answer to plaintiffs' complaint.[145] If the question is once again presented, *Colaizzi* might eventually wend its way back to the United States Supreme Court for a definitive ruling on the status of this absolute privilege in the context of a section 1983 action. With this question of first impression included, the case would be more likely to gain review than in its present posture. Since recent Supreme

140. At common law, such communications are absolutely privileged. *See* note 30 and accompanying text *supra*. The status of this privilege in the context of a section 1983 action is undetermined.

141. *See* PROSSER, *supra* note 7, at 745-60, 762-63.

142. The burden of proving that the remarks were *not* made in good faith would be upon the plaintiff.

143. 45 U.S.L.W. 3667 (U.S. Apr. 5, 1977) (No. 76-785).

144. FED. R. CIV. P. 12(b)(6).

145. *See* 5 CYCLOPEDIA OF FEDERAL PROCEDURE §§ 1505, 1506 (3d ed. 1968).

Court decisions have favored perpetuation of common law immunities, even when subjected to a section 1983 attack, the Court would be likely to recognize Walker's privilege as a bar to plaintiffs' liberty interest claims.

CONCLUSION

In *Colaizzi*, the Court of Appeals for the Seventh Circuit determined that discharge of a public employee, coupled with a statement of the reasons for the dismissal which could injure the former employee's reputation, amounts to a taking of liberty without procedural due process. In this respect, *Colaizzi* tracks earlier United States Supreme Court decisions. However, *Colaizzi* contains an added ingredient which has never been considered by the Supreme Court and which, unfortunately, was not considered by the Court of Appeals for the Seventh Circuit. The statement complained of in *Colaizzi* was made by an official protected at common law from liability for defamatory remarks. In permitting the section 1983 claim to override the common law immunity, the court failed to weigh the countervailing interests or to consider Supreme Court opinions which evince a preference for allowing such immunities.

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